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## Copyright--The Home Video Recording Controversy

Mark E. Kauffelt

*West Virginia University College of Law*

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## STUDENT NOTES

### COPYRIGHT—THE HOME VIDEO RECORDING CONTROVERSY

Recent technological advances in the area of home entertainment have given every television owner the chance to tape his favorite television programs. The new home video-cassette recording systems have made the time of television viewing a matter of convenience and the subject a matter of choice. Television programs may now be taped with or without the viewer present. Moreover, a viewer may watch one program and simultaneously record another. Television scheduling, formerly the exclusive domain of corporate executives, has suddenly become a personal art. The arrival of these new systems, and this new art, have brought with them a new legal problem. The problem has arisen in the area of copyright law.

Performances which are seen on television can be protected by copyrights.<sup>1</sup> The owners of these, or of any, copyrights retain certain exclusive rights, one of which is the right to reproduce the copyrighted work.<sup>2</sup> A direct conflict seems to arise between the copyright owner and any owner of a home video-cassette device who records the copyright owner's work. It is a conflict which is not easily resolved.

#### COPYRIGHT INFRINGEMENT

A copyright has been defined as "[t]he right of literary property as recognized, and sanctioned by positive law"<sup>3</sup> or as "[a]n intangible incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is vested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling

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<sup>1</sup> There is little doubt that the 1976 Copyright Act can protect television programs. "Motion pictures and other audiovisual works" are listed, in 17 U.S.C.A. § 102 (1976), as a proper subject matter of a copyright. Audiovisual works are defined as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." 17 U.S.C.A. § 101 (1976).

<sup>2</sup> 17 U.S.C.A. § 106(1) (1976).

<sup>3</sup> BLACK'S LAW DICTIONARY 406 (rev. 4th ed. 1968).

them.”<sup>4</sup> More abstractly, a copyright is “at once the equivalent given by the public for benefits bestowed by the genius and mediations and skill of individuals and the incentive to further efforts for the same important objects.”<sup>5</sup>

A copyright is the creature of the federal statute which created it. Congress, in passing such legislation, did not merely sanction an existing right. Congress created a new right.<sup>6</sup> The holder of a copyright, therefore, does not have control over all uses of the copyrighted work. The holder has exclusivity over only those uses which are statutorily given to him.<sup>7</sup> Under the new 1976 Copyright Act, which took effect on January 1, 1978, a copyright gives its holder a limited number of exclusive rights:

Subject to sections 107 through 118, the owner of a copyright under this title has exclusive rights to do and to authorize any of the following:

- 1) to reproduce the copyrighted work in copies or phonorecords;
- 2) to prepare derivative works based upon the copyrighted work;
- 3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.<sup>8</sup>

Copyright infringement, therefore, can be defined in a negative way. If a person, unauthorized by the copyright holder, uses a copyrighted work in a way that is within the scope of one of the exclusive rights in the above section, there is an infringement. However, if the unauthorized use is not specifically listed as within the exclusive rights of the copyright holder, there is no infringement of the copyright.<sup>9</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Fox Film v. Doyal*, 286 U.S. 123, 127-28 (1932).

<sup>6</sup> *Id.* at 127.

<sup>7</sup> *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 393-94 (1968).

<sup>8</sup> 17 U.S.C.A. § 106 (1976).

<sup>9</sup> *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 394-95 (1968).

The video-cassette recording of copyrighted television broadcasts seems to fall within the scope of the exclusive rights of the copyright holder. The 1976 Act provides that the holder is the only individual who can, among other things, reproduce the copyrighted work in copies.<sup>10</sup> The Act states that the holder is the only one who can authorize such reproduction.<sup>11</sup> Webster's Third New International Dictionary defines "reproduce" in several ways, one of which is "to cause to be or seem to be repeated."<sup>12</sup> This definition also describes the purpose of the video-cassette systems, i.e., to cause a television show to be or seem to be repeated.

Moreover, the cassettes which are produced for later play fall easily within the statutory definition of the term "copies," a further indication that the new systems infringe upon the copyright holder. The Act defines "copies" as "material objects . . . in which work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>13</sup> This could as easily be the definition of "video-cassette" as it is of "copies." It would seem, therefore, that video-taping is within the exclusive province of the copyright holder or his agent.<sup>14</sup>

Case law on the subject is sparse since the taping of television broadcasts is a relatively new enterprise. *Walt Disney Productions v. Alaska Television Corp.*<sup>15</sup> addressed the issue of copyright infringement by a

recording system . . . [which] captured the impulses and put them in such form that they were capable of being perceived, with proper equipment, innumerable times, and after any passage of time, subject only to the limitations imposed by the

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<sup>10</sup> 17 U.S.C.A. § 106(1) (1976).

<sup>11</sup> *Id.*

<sup>12</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1927 (G.&C. Merriam Co. 1970).

<sup>13</sup> 17 U.S.C.A. § 101 (1976).

<sup>14</sup> H.R. REP. NO. 94-1476, 94th Cong., 2nd Sess. 61, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5675 stated that

[r]ead together with the relevant definitions in section 101, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce the material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or indirectly or with the aid of a machine or device."

<sup>15</sup> 310 F. Supp. 1073 (W.D. Wash. 1969).

characteristics of the plastic tape upon which the iron particles are mounted.<sup>16</sup>

The description of this recording is also applicable to a home video-cassette recording system and, therefore, would seem to have some relevance. In *Walt Disney*, the court ruled that the mere preparation of video tapes of copyrighted material on the above-described system for delayed broadcast on a cable system infringed upon the copyright holder's rights under the then applicable statutory copyright law.<sup>17</sup>

However, the case is not as strong as it would first appear. The court seemed to feel that the potential for wide distribution was an important factor, stating that

[w]hile the defendants did not make the video tapes available on a widespread basis, the tapes were *capable* of being sold to any cable television system with the proper equipment. Such a distribution could, and no doubt would, be in direct competition with the owner of the copyrighted material contained, albeit hidden, therein.<sup>18</sup>

The court then named two distinct and separate copyright infringements: 1) the preparation of the video tapes; and 2) the dissemination of the video-taped programs.<sup>19</sup> The curious emphasis on potential distribution in the discussion of broadcast taping is an emphasis which should have been placed on the discussion of dissemination infringement. However, *Walt Disney* demonstrates that courts have little difficulty placing video-taping within the exclusive province of the copyright holder.<sup>20</sup>

Home video-cassette recording, when weighed against the exclusive rights of the copyright holder,<sup>21</sup> is clearly an infringement. However, these exclusive rights are subject to both statutorily and judicially created limitations. Infringement, therefore, cannot be said to be present until the applicability of these limitations are assessed in the area of home video-cassette recording.

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<sup>16</sup> *Id.* at 1075.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 17 U.S.C.A. § 1(d) (1947) (current version at 17 U.S.C.A. § 106(1) (1976)) provided, in part: "[T]o make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method exhibited, performed, represented, produced or reproduced." The 1976 Act covers this area with the language "to reproduce in copies. . . ." 17 U.S.C.A. § 106 (1) (1976).

<sup>21</sup> *See* 17 U.S.C.A. § 106 (1976).

The 1976 Copyright Act makes no mention of the home-taping of television broadcasts. In fact, there is very little mention of home viewing. However, the Act does discuss home viewing in the context of limiting a copyright holder's exclusive rights. Chapter 17, section 110 of the U.S. Code provides, in part, that

notwithstanding the provisions of 106, the following are not infringements of copyright . . .

5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes unless-

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public.<sup>22</sup>

Could "further transmission" refer to an apparatus for recording and later viewing? The 1976 Copyright Act defines "to transmit" as "to communicate a performance or display by any device or process whereby images or sounds are received beyond the place from which they are sent."<sup>23</sup> A home recorder is a device which permits images to be received beyond the point of time when they were sent but not "from beyond the place from which they are sent." A video recording is sent and received in the same place. Video-cassette recording devices, therefore, do not "transmit."

Since the "transmission" exceptions to the limitation do not apply to home viewing, the limitation itself must be examined. In this case, the limitation on the copyright holder's exclusive rights does not apply to home recording. The statute speaks only of "a single receiving apparatus."<sup>24</sup> Congress merely wished to protect a person who turns on an ordinary television in a public place.<sup>25</sup> Home recording is not mentioned. Therefore, Congress did not expressly address the issue of home video-cassette recorders in the form of exemptions or limitations in the 1976 Act. Such devices must face traditional infringement analysis.

### THE FAIR USE DOCTRINE

There are also judicially created limitations on the exclusive

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<sup>22</sup> *Id.* at § 110.

<sup>23</sup> *Id.* at § 101.

<sup>24</sup> *Id.* at § 110 (5).

<sup>25</sup> H.R. REP., *supra* note 14, at 86, U.S. CODE CONG. & AD. NEWS, at 5700.

<sup>26</sup> *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 732 (S.D.N.Y. 1974).

rights of the copyright holder. The limitation which has the greatest potential application is the "fair use" doctrine. A look at this doctrine will be of substantial value in determining whether home video-cassette recording systems infringe copyrights.

The doctrine of "fair use" has been described as a "privilege in others than the owner of a copyright to use the copyrighted material without his consent, notwithstanding the monopoly granted to the owner."<sup>26</sup> It is a "rule of reason,"<sup>27</sup> which can be used as a defense against an infringement action on the grounds that the alleged infringer's use was outside the legitimate scope of the copyright holder's exclusive rights.<sup>28</sup> Beyond these general statements, what is considered a "fair use" cannot be precisely defined.<sup>29</sup>

Several justifications have been put forth for the creation of this doctrine: implied consent,<sup>30</sup> custom,<sup>31</sup> inconsequential amount of copying,<sup>32</sup> and the public policy of encouraging the development of art, science, and industry.<sup>33</sup> Of these justifications, the encouragement of art, science, and industry is the most comprehensible.<sup>34</sup> The constitutional purpose in granting copyright protection in the first place was: "To Promote the Progress of Science and Useful Arts."<sup>35</sup> "Fair use" is, under the public policy justification, merely a continuation of the stated constitutional purpose for granting copyrights.

Although difficult to define, the courts are not without guidelines in applying the "fair use" doctrine. Certain factors have been considered in determining whether a particular use is "fair"<sup>36</sup> and

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<sup>27</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1377 (Ct. Cl. 1973) (dissenting opinion), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

<sup>31</sup> *Rosenfield, Customary Use as "Fair Use" In Copyright Law*, 25 *BUFF. L. REV.* 119, 132-39 (1975).

<sup>32</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1377 (Ct. Cl. 1973) (dissenting opinion), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>33</sup> *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970).

<sup>34</sup> *Deely, Copyright: Limitation On Exclusive Rights, Fair Use*, 13 *HOUSTON L. REV.* 1041, 1051 (1976).

<sup>35</sup> U.S. CONST. art. I, § 8.

<sup>36</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1377 (Ct. Cl. 1973)

these factors, along with the doctrine, have been codified in the 1976 Act. Section 107 provides that

[n]otwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—

- 1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>37</sup>

Although the "fair use" doctrine has only been recently codified, it has a long history as a judicially created doctrine. A look at this history, and more particularly, at the history of each factor of the "fair use" doctrine, could shed light upon whether home recording of television broadcasts would fall under the recent codification. This, in turn, may answer the question of whether such recording is a copyright infringement.

## I. THE PURPOSE AND CHARACTER OF THE USE

The 1976 Copyright Act provides a list of uses which are not infringements: criticism, news reporting, comment, teaching, scholarship, and research.<sup>38</sup> These uses are purposeful uses, consistent with the goal of promoting the development of art, science, and industry. In other words, criticism, news reporting, comment, teaching, scholarship, and research can be seen as promoting "the Progress of Science and Useful Arts."<sup>39</sup>

Case law supports the concept that a "fair use" should further science and the useful arts. In *Berlin v. E.C. Publications, Inc.*,<sup>40</sup>

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(dissenting opinion), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>37</sup> 17 U.S.C.A. § 107 (1976).

<sup>38</sup> *Id.*

<sup>39</sup> U.S. CONST. art. I, § 8.

<sup>40</sup> 329 F.2d 541 (2d Cir. 1964).



the court stated that "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry."<sup>41</sup> Consequently, the privilege is applied to works in the fields of science, law, medicine, history, and biography.<sup>42</sup> In fact, the constitutional mandate of article I, section 8 promoting "the Progress of Science and Useful Arts," consistently leads courts to resolve questionable infringements against the alleged infringer if there is a potential injury to those goals.<sup>43</sup>

The home recording of television broadcasts is not for the purpose of criticism, comment, news reporting, teaching, scholarship, or research. Nor is it involved, generally, with works in the field of science, law, medicine, history, or biography. Home video-cassette recording systems are used primarily for reproduction for entertainment purposes. Entertainment is not a purpose which the 1976 Copyright Act or prior case law recognizes as sufficient to invoke the "fair use" doctrine.

However, a new trend has emerged in the character and purpose factor, which has expanded the sanctuary of "fair use."<sup>44</sup> This trend began with *Rosemont Enterprises, Inc. v. Random House*,<sup>45</sup> a case involving the alleged infringement of a Howard Hughes biography. It is based on the application of the doctrine in which the "distribution [of particular material] would serve the public interest in the free dissemination of information."<sup>46</sup> The court, in this case, also stressed the public's right to know about important public figures.<sup>47</sup>

The trend continued in *Time Inc. v. Bernard Geis Associates*.<sup>48</sup> The reproduction of certain frames of the Zapruder film, the famous film of the assassination of President John Kennedy, was held to be a "fair use" because "[t]here is a public interest in

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<sup>41</sup> *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964); See generally *Rosemont Enterp. Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966).

<sup>42</sup> *Rosemont Enterp. Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966).

<sup>43</sup> *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219, 228 (E.D.N.Y. 1963).

<sup>44</sup> Deely, *supra* note 34, at 1055.

<sup>45</sup> 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

<sup>46</sup> *Id.* at 307.

<sup>47</sup> *Id.* at 309.

<sup>48</sup> 293 F. Supp. 130 (S.D.N.Y. 1968).

having the fullest information available on the murder of President Kennedy.”<sup>49</sup> In 1973, the court in *Meeropol v. Nizer*<sup>50</sup> used the same basic reasoning to find that the use of previously published letters of Ethel and Julius Rosenberg was a “fair” one.<sup>51</sup>

However, even the “public interest in the free dissemination of information” has not been found to include pure entertainment. *Rohauer v. Killiam Shows, Inc.*<sup>52</sup> involved the television broadcast of *The Son of the Sheik*, a silent movie starring Rudolph Valentino. With respect to a claim of “fair use,” the court held that “[i]t can scarcely be argued here that the enduring fame of Rudolph Valentino or the intrinsic literary and historical merit of ‘The Son of the Sheik’ (whatever it may be) serves any public interest sufficient to endow these defendants with the privilege of fair use.”<sup>53</sup>

Modern television is not entirely an entertainment media. News documentaries, news programs, and other educational programs make television a mixed media, primarily entertainment, but partially a disseminator of important information. Television broadcasts contain not only entertainment and commercials, which are outside the scope of the “fair use” doctrine,<sup>54</sup> but also works in the fields of science, law, medicine, history, and biography. However, considering the overwhelming entertainment nature of this media, it would be a substantial extension of the new trend for a court to find that it permitted the video-taping of television broadcasts to fall under the “fair use” doctrine.

The 1976 Copyright Act includes, as criteria under the purpose and character of the use, the consideration of whether the use is of a commercial nature or is for nonprofit educational purposes.<sup>55</sup> Educational use has, as previously discussed, received Congressional approval as a proper subject which would invoke the “fair use” doctrine.<sup>56</sup> Commercial use has not received such approval.<sup>57</sup>

<sup>49</sup> *Id.* at 146.

<sup>50</sup> 361 F. Supp. 1063, 1068 (S.D.N.Y. 1973).

<sup>51</sup> *Id.*

<sup>52</sup> 379 F. Supp. 723 (S.D.N.Y. 1974).

<sup>53</sup> *Id.* at 733.

<sup>54</sup> *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938); *clarified in Rosemont Enterp. Inc. v. Random House, Inc.* 366 F.2d 303 (2d Cir. 1966).

<sup>55</sup> 17 U.S.C.A. § 107 (1976).

<sup>56</sup> *See generally Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 732 (S.D.N.Y. 1974).

<sup>57</sup> *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

The home video-cassette recorder is, again, placed in an ambiguous position. The potential infringer, the home user, is not involved in a commercial use. But his use would be based primarily on entertainment. *Rohauer v. Killiam Shows, Inc.*<sup>58</sup> indicated that an entertainment use would be considered an infringement, closer to the nature of a commercial use than a nonprofit educational use. This seems to indicate that home video-recorders would find no support for a claim of non-infringement under this factor of the "fair use" doctrine.

## II. THE NATURE OF THE COPYRIGHTED WORK

The second factor to be considered in applying the "fair use" doctrine is the "nature of the copyrighted work."<sup>59</sup> This factor includes shades of the "purpose and character" factor, but can be distinguished because it restricts scrutiny to a consideration of the particular purpose for which the copyrighted work is published.<sup>60</sup> Congressional consideration of section 107 of the 1976 Copyright Act was centered primarily around the question of reproduction for classroom purposes, particularly photocopying.<sup>61</sup> However, the discussion is helpful in determining whether the "fair use" doctrine should be applied to the home video-taping of television broadcasts.

One Senate report discusses and explains the 1976 Act and this factor of the "fair use" doctrine.<sup>61.1</sup> The key to this factor, although not necessarily determinative, is whether the work is available to the potential user.<sup>62</sup> If the work has been published but is now "out of print" and unavailable through normal channels, there is more justification for copying. However, if a published work is available (for example, articles from periodicals published primarily for student use), there should not be a liberal application of the "fair use" doctrine.<sup>63</sup>

But unpublished works are another matter. The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under

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<sup>58</sup> 379 F. Supp. 723 (S.D.N.Y. 1974).

<sup>59</sup> 17 U.S.C.A. § 107(2) (1976).

<sup>60</sup> Deely, *supra* note 34, at 1057.

<sup>61</sup> H.R. REP., *supra* note 14, at 66, U.S. CODE CONG. & AD. NEWS, at 5679.

<sup>61.1</sup> S. REP. No. 94-473, 94th Cong., 2nd Sess. (1976).

<sup>62</sup> *Id.* at 64.

<sup>63</sup> H.R. REP., *supra* note 14, at 66, U.S. CODE CONG. & AD. NEWS, at 5679.

ordinary circumstances the copyright owner's "right of reproduction" would outweigh any needs of reproduction for classroom purposes.<sup>64</sup>

A video-tape of a television broadcast is, at this time, unavailable to the average viewer under ordinary circumstances. It is in the sole possession of the broadcasters and, presumably, cannot be readily purchased. The 1976 Copyright Act defines "publication" as "the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . . A public performance or display of a work does not of itself constitute publication."<sup>65</sup> The television broadcasts might, therefore, be considered an unpublished work, despite the fact that millions of people may have seen them.

As stated above, Congress felt that the copying of an unpublished work should not be encouraged,<sup>66</sup> even in an educational setting. It would seem unlikely that a copyrighted work that is unpublished and is desired for primarily entertainment reasons would receive better treatment. The applicability of the "fair use" doctrine, therefore, would be narrowly limited for home video-cassette recording of television broadcasts under the reasoning of this factor of the doctrine.

### III. THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION TO THE COPYRIGHTED WORK AS A WHOLE

The home video-cassette recording of television broadcasts is a complete reproduction of a copyrighted work. The relation between the amount and substantiality of the portion copied and the copyrighted work as a whole is total. They are identical. This creates substantial problems in discussing the "fair use" doctrine in the context of television taping since the general proposition concerning a total reproduction is that a complete copying is never a "fair use" even if there is no intent to profit from the copying.<sup>67</sup>

In *Leon v. Pacific Telephone & Telegraph Co.*,<sup>68</sup> the copyright holder was attempting to prevent the sale of numerical telephone directories. The defendants were unable to rely upon the doctrine

<sup>64</sup> *Id.*

<sup>65</sup> 17 U.S.C.A. § 101 (1976).

<sup>66</sup> H.R. REP., *supra* note 14, at 66, U.S. CODE CONG. & AD. NEWS, at 5679.

<sup>67</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1377-78 (Ct. Cl. 1973) (dissenting opinion), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>68</sup> 91 F.2d 484 (9th Cir. 1937).

of "fair use" because of the absence of any authority which "lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be a fair use."<sup>69</sup> *Wihtol v. Crow*<sup>70</sup> involved the copying of a choral instructor's new arrangement of a copyrighted work. The copies of the new arrangement, forty-eight in all, were distributed to a high school choir. The court held that such copying was an infringement.<sup>71</sup> This case is cited in support of the idea that total reproduction is impermissible under the "fair use" doctrine, even if the copying is done to further educational or artistic goals and without intent to make a profit.<sup>72</sup>

However, in *Williams & Wilkins Co. v. United States*,<sup>73</sup> the court indicated that the doctrine that a complete copying was never a "fair use" was "an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice."<sup>74</sup> The court distinguished *Pacific Telephone & Telegraph Co.*<sup>75</sup> on the ground that it involved actual publication and distribution of many copies, rather than just the making of one copy for personal use.<sup>76</sup> *Wihtol v. Crow*<sup>77</sup> was also distinguished on the ground that multiple copies were made.<sup>78</sup> The court then cited *New York Tribune v. Otis*,<sup>79</sup> a case involving the photostatic copying of a newspaper editorial, as a demonstration that "the copying of an entire copyrighted item is not enough, in itself, to preclude application of 'fair use'."<sup>80</sup> Finally, the court rejected the entire concept of total reproduction as a block to the "fair use" doctrine. "There is, in short, no inflexible rule excluding an entire copyrighted work from the area of 'fair use.' Instead, the extent of the copying is one important factor, but only one, to be taken into account, along with several others."<sup>81</sup>

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<sup>69</sup> *Id.* at 486.

<sup>70</sup> 309 F.2d 777 (8th Cir. 1962).

<sup>71</sup> *Id.* at 781.

<sup>72</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1377-78 (Ct. Cl. 1973) (dissenting opinion), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>73</sup> 487 F.2d 1345 (Ct. Cl. 1973).

<sup>74</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 (Ct. Cl. 1973), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>75</sup> 91 F.2d 484 (9th Cir. 1937).

<sup>76</sup> 487 F.2d at 1353, n. 12.

<sup>77</sup> 309 F.2d 797 (8th Cir. 1962).

<sup>78</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353, note 12 (Ct. Cl. 1973), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>79</sup> 39 F. Supp. 67 (S.D.N.Y. 1941).

<sup>80</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353, note 12 (Ct. Cl. 1973), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>81</sup> *Id.*

The Senate Report on the 1976 Copyright Act<sup>82</sup> provides no real clues as to which line of reasoning is correct concerning this consideration. The Senate felt that excerpts from the copyrighted material that are "not substantial in length" should be considered a "fair use," providing the other factors of the doctrine are present.<sup>83</sup> But there is no discussion of the production of one complete copy for non-commercial use. Therefore, the effect of this aspect of the "fair use" doctrine on home video-cassette recording is unknown.

#### IV. THE EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR, OR VALUE OF, THE COPYRIGHTED WORK

The finding of whether the alleged infringer's work tends to diminish or prejudice the potential sale of the copyrighted work has usually been considered the most important factor of the "fair use" doctrine.<sup>84</sup> In fact, its importance has been used to explain decisions which would otherwise be quite puzzling.<sup>85</sup> This injury, or decrease in value, to the copyrighted work does not have to be actual. Potential injury is sufficient to prevent the invoking of the "fair use" doctrine.<sup>86</sup>

Do video-cassette recorders, used only in the home, injure the market for, and the economic value of, copyrighted television broadcasts? The Nielsen Corporation, the leading television survey organization, treats the recording of a television broadcast as a viewing of the broadcast.<sup>87</sup> This would seem to increase the viewing audience, since people could record a broadcast when they would be unable to view it. An increased audience would not damage the economic value of the copyrighted work.

However, since a video-cassette recording can be played more than once, the audience for a network rebroadcast of a television program could decrease substantially as the number of home recor-

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<sup>82</sup> S. REP. NO. 94-473, 94th Cong., 2d Sess. (1976).

<sup>83</sup> *Id.* at 65.

<sup>84</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1377 (Ct. Cl. 1973) (dissenting opinion), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>85</sup> M. NIMMER, *NIMMER ON COPYRIGHT* § 145, at 646 (1976).

<sup>86</sup> *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F.Supp. 302, 304 (E.D. Pa. 1938).

<sup>87</sup> Letter from Laurence Frerk, Promotion Director, A.C. Nielsen Co., to the author (Dec. 8, 1977); for information on the workings of the rating system, see Myers, Jr., *On the Reliability of Ratings*, *TELEVISION QUARTERLY*, Vol. 1, 50-62 (Feb., 1962).

ders purchased increases.<sup>88</sup> Through several playings of a recording, the broadcast would undoubtedly reach more people than the initial television performance. Yet additional replays, and the increased audience generated from them, would not be considered in a television-rating survey. The audience which viewed only the home recording would not, in all probability, view the network rebroadcast. There would, therefore, be a greater decrease in the network rebroadcast than there would be a measurable initial gain in the original broadcast through the use of recorders. Moreover, people who would normally watch a television program a second time would use a taped version, if available, rather than watch the actual network rebroadcast at a time of the broadcaster's choosing, further decreasing the viewing audience for rebroadcasts. This decrease in the viewing audience would decrease the value of the copyrighted work.<sup>89</sup>

Motion pictures which are shown on television also create a problem. The ability to record motion pictures at home potentially decreases their value and shrinks the market for redistribution to theaters. Who would pay several dollars to see a movie that could be seen at any time, in the comfort of the home? Home recordation would not only hinder redistribution but would also make the owners of a motion picture reluctant to permit a movie which could potentially be redistributed to theaters or even be sold as prerecorded cassettes for home play to be shown on television. This would lower the market for the copyrighted material thus decreasing its economic value.

A strong argument can be made for potential economic damage to the copyright holder of a television broadcast recorded by home viewers. Although this is considered the most important factor of the "fair use" doctrine,<sup>90</sup> all four factors must be weighed and considered in determining whether any use is a "fair" one.<sup>91</sup> But

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<sup>88</sup> Sony, a leading manufacturer of video-cassette recorders, expects to sell several hundred thousand machines in the U.S. in 1978, with sales increasing thereafter at the rate of 30% to 40% annually. Industry predictions are that by 1980 over one million machines will be sold in the U.S. Plaintiffs' Preliminary Pre-Trial Memorandum of Points and Authorities at 9, *Universal v. Sony*, No. CV 76 3520 F (C.D.Cal., filed Sept. 17, 1977).

<sup>89</sup> The decreased viewing audience "is certain to cause broadcasters to decrease purchase of repeat rights, or at the very least decrease the amount of their payment for those repeats." *Id.* at 105.

<sup>90</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1377 (Ct. Cl. 1973) (dissenting opinion), *affirmed by an equally divided Supreme Court*, 420 U.S. 376 (1975).

<sup>91</sup> See *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269,

consideration of these other factors also weighs heavily against home video-cassette recording's qualification as a "fair use." The purpose of the copying, entertainment, the nature of the copyrighted work, also entertainment, and the total reproduction of the copyrighted work all fall outside the traditional "fair use" exception. While there are no rigid rules which can be applied,<sup>92</sup> the home video-cassette recording of television broadcasts does not seem to fit under the "fair use" doctrine as it presently exists.

## V. HOME AUDIO-RECORDING

While the home recording of television broadcasts is a relatively new phenomena, the home recording of phonorecords by the use of tapes has been present for some time.<sup>93</sup> The past treatment of phonorecording, therefore, could give substantial insight into the future treatment of home video recording.

Congress, in 1971, amended title 17 of the United States Code<sup>94</sup> to provide for the creation of a limited copyright in sound recording for the purpose of protecting against unauthorized duplication.<sup>95</sup> Home audio-recording was not expressly exempted. However, this limited copyright was not intended to interfere with home recording: "[s]pecifically, it is not the intention of the Committee to restrain home recording . . . where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it."<sup>96</sup> The legislative report further indicates that home audio-recording was seen as no real threat to the record producers and performers.<sup>97</sup>

One might argue that home video-recording presents an analogous situation. If Congress, at the time of the passage of a law protecting sound recordings from duplication, did not intend to stop home audio-recording, it is unlikely that Congress would have desired to stop home recording, video or audio, when it passed the 1976 Copyright Act without mentioning such recording. However, this analogy is not as strong as it would first appear.

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1274 (S.D.N.Y. 1970).

<sup>92</sup> Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203, 213 (1954).

<sup>93</sup> H.R. REP. NO. 92-487, 92d Cong., 1st Sess., reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1566.

<sup>94</sup> 17 U.S.C.A. § 1 (f) (1971).

<sup>95</sup> H.R. REP., *supra* note 93, at 1566.

<sup>96</sup> *Id.* at 1572.

<sup>97</sup> *Id.*



The Congressional reasoning for retaining home audio-recording was that the "practice was common and unrestrained today and that the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years."<sup>98</sup> This reasoning, which has been criticized as hardly giving principled ground for governmental approval,<sup>99</sup> is probably not applicable to the taping of home television broadcasts. The practice is not yet common or unrestrained. Moreover, the ability to home video-record has not been present for 20 years.<sup>100</sup>

The analogy further breaks down when one considers that the 1971 amendment to title 17 created a limited copyright for sound recordings, but it did not include sound accompanying a motion picture.<sup>101</sup> The term "motion pictures" represented a broad genus, of which television could be and was included.<sup>102</sup> In fact, Congress specifically discussed the recording of television audio: "if there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on video tape, a suit for copyright infringement could be sustained under section 1(a) of title 17 rather than under the provisions of this bill . . ."<sup>103</sup>

When the 1971 amendment was promulgated, the home recording of television programs was not widespread.<sup>104</sup> Mere audio-recording of television, however, was banned, although such recording is hardly a substitute for the actual television broadcast. It does not stretch the imagination too far, therefore, to theorize that Congress, having disapproved of the audio-recording of television, would have disapproved of the video-recording of the same media, had they been aware of its present widespread nature.

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<sup>98</sup> *Id.*

<sup>99</sup> M. NIMMER, NIMMER ON COPYRIGHT § 109.212, at 442.7 (1976).

<sup>100</sup> Sony, a leading manufacturer of video-cassette recorders, produced a black and white reel to reel recorder for home use in the mid-1960's. The machine was unsuccessful and was withdrawn from the market after a short period. Sony's present machine was first offered for sale in the U.S. in late 1975. Plaintiffs' Preliminary Pre-Trial Memorandum of Points and Authorities at 3-4, *Universal v. Sony*, No. CV 76 3520 F (C.D. Cal., filed Sept. 17, 1977).

<sup>101</sup> H.R. REP., *supra* note 93, at 1570.

<sup>102</sup> *Id.* at 1571.

<sup>103</sup> *Id.* at 1572. Section 1(a) of Title 17 of the then applicable federal copyright law gave the copyright holder the exclusive right to "print, reprint, publish, copy, and vend the copyrighted work." 17 U.S.C.A. § 1(a) (1949) (current version at 17 U.S.C.A. § 106).

<sup>104</sup> See n. 100 *supra*.

The section of the 1976 Copyright Act which is the equivalent to the 1971 amendment to title 17 includes, unlike its predecessor, the sound of motion pictures and other audio-visual works.<sup>105</sup> The exclusive rights of the copyright holder listed include the right to reproduce the work in copies.<sup>106</sup> However, the Congressional Report on this section makes no mention of home recording, either audio or video.<sup>107</sup> While it would seem possible to conclude that no mention of home audio-recording leaves previous statements concerning the home recording in effect, it is difficult to interpret the silence as an expansion of those statements into the visual area.

The 1976 Copyright Act does contain an exception for video-taping of television broadcasts, although it is a greatly restricted exception. A library or archives may reproduce and distribute by lending a limited number of copies of an audiovisual news program.<sup>108</sup> This exception applies to the daily newscasts of the national television networks.<sup>109</sup> "It does not apply to documentary . . . , magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public."<sup>110</sup> Such a restrictive exception seems to indicate that Congress had no intention of authorizing the general video-taping of television broadcasts, even by a library or archive. The language of this exception also indicates that the recorder of television broadcasts who wishes to use the tapes primarily for entertainment purposes will find little support for his action in the 1976 Copyright Act.

## VI. CONTRIBUTORY INFRINGEMENT

The home recording of a television broadcast is quite possibly an act which infringes on a copyright. However, it would be impossible for the holder of a copyright to stop the actual recording process in every individual's home. Any infringement action must, therefore, be directed against the manufacture of the equipment that makes the infringement possible. Such action is possible through the concept of contributory infringement.

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<sup>105</sup> 17 U.S.C.A. § 114(b) (1976) provides, in part: "[t]he right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording."

<sup>106</sup> This is the application of 17 U.S.C.A. § 106(1) through 17 U.S.C.A. § 114(b).

<sup>107</sup> H.R. REP., *supra* note 14, at 106, U.S. CODE CONG. & AD. NEWS, at 5721-22.

<sup>108</sup> 17 U.S.C.A. § 108(f)(3) (1976).

<sup>109</sup> H.R. REP., *supra* note 14, at 77, U.S. CODE CONG. & AD. NEWS, at 5690.

<sup>110</sup> *Id.*

A contributory infringer is one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.<sup>111</sup> The manufacturers of the home video-cassette recorders fit this definition. The design of the machine itself, and the style of advertising, would seem to demonstrate the manufacturer's knowledge of the infringing act. Moreover, the recording device, without which the infringement would not be possible, is clearly a "material contribution."<sup>112</sup>

The manufacturer of a home recorder has no control over its use once the product is sold. However, formal control over the infringer is not necessary for a finding of contributory infringement.<sup>113</sup> A case involving an early motion picture, made from the novel *Ben Hur*, provides language which is most appropriate to the present situation. Justice Holmes, in ruling that the film's producers were liable for the infringement of the film's unlawful public exhibitions, stated:

[t]he defendant not only expected but invoked by advertisement the use of its films for "the infringing exhibitions." That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act. It is liable on the principles recognized in every part of law.<sup>114</sup>

The liability which attaches to a contributory infringer is based on the concept that copyright infringement is a tort.<sup>115</sup> As such, "the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor is applicable in suits arising under the Copyright Act."<sup>116</sup>

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<sup>111</sup> *Gershwin Publishing Corp. v. Columbia Artists Man., Inc.*, 443 F.2d 1159, 1162 (2d. Cir. 1971).

<sup>112</sup> "[M]ere quantitative contribution cannot be the proper test to determine copyright liability . . . . Rather, resolution of the issue . . . depends upon a determination of the function that [the alleged infringer] plays in the total process. . . ." *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 397 (1968). In the case of home recording, the function of the manufacturer is to supply all reproducing equipment, a major role in the total process, both quantitatively and qualitatively.

<sup>113</sup> *Gershwin Publishing Corp. v. Columbia Artists Man., Inc.*, 443 F.2d 1159, 1163 (2d Cir. 1971).

<sup>114</sup> *Kalem Co., v. Harper Bros.*, 222 U.S. 55, 62-63 (1911).

<sup>115</sup> *Leo Feist Inc. v. Young*, 138 F.2d 972, 975 (7th Cir. 1943).

<sup>116</sup> *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966).

The manufacturer of home video-recording devices might also be liable under the theory of "vicarious" infringement. A vicarious infringer is one who promotes or induces the infringing acts.<sup>117</sup> A vicarious infringer must have the right and ability to supervise the infringing activity and a direct financial interest in such activity,<sup>118</sup> but he need not have actual knowledge of the infringement.<sup>119</sup> The manufacturer of home video-cassette recording devices has a direct financial interest in the home recording. Continued sales of the video-cassettes and the recording devices provide that interest. Liability under this theory, therefore, would turn on whether a court felt a manufacturer has the right and ability to supervise the home recording.

## VII. REMEDIES

There are several remedies available to the copyright holder once it has been determined that an infringement has occurred. In the case of home video-recorders, the copyright holder would probably desire an end to the manufacturing of the equipment. In the past, it has been within the power of a court to enjoin the sale of a machine which is used primarily for copyright infringement to prevent further infringement, even though it is not known which of several copyrighted works would be infringed.<sup>120</sup> This power apparently could be used to prevent the sale of video-cassette recorders, and there is no indication that it has been changed by the 1976 Copyright Act.

Under the 1976 Act, an injunction may be granted "on such terms as [the court] may deem reasonable to prevent or restrain infringement of a copyright."<sup>121</sup> The end of the sale, and of the manufacture, of the home video-recorders seems to be the only way to prevent or restrain the infringement. The court could order, as part of the final judgment, the destruction of the home recorders still in the manufacturer's possession.<sup>122</sup>

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<sup>117</sup> *Gershwin Publishing Corp. v. Columbia Artists Man., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>118</sup> *Id.*

<sup>119</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

<sup>120</sup> See *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973).

<sup>121</sup> 17 U.S.C.A. § 502 (1976).

<sup>122</sup> 17 U.S.C.A. § 503 (1976) provides, in part: "[a]s part of a final judgment or decree, the court may order the destruction or other reasonable disposition . . . of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies . . . may be reproduced."

The copyright owner is also "entitled" to recover actual damage and any profits of the infringer which are attributable to the infringement.<sup>123</sup> However, it would be very difficult to prove, in the case of a home video-cassette recorder, the damage and profits, for that particular infringement. The copyright holder, therefore, could elect to take the statutory damages.<sup>124</sup> But such damages would be incidental to the halting of the sale and manufacture of the infringing machines.

### *Conclusion*

The question of the legality of home video-cassette recorders has now been raised in court proceedings.<sup>125</sup> It seems clear that home recording of television broadcasts will find little protection under the law of copyright as it presently exists. Both the statutory scheme and common law doctrines authorize no such use of copyrighted material. Although the law appears to be fairly clear on the subject, judicial resolution of this issue is not easily predicted. In order to make a finding of infringement, a court must be willing to prevent the manufacture of a very popular technological advancement. Moreover, a court would have to be willing to stop this manufacture while realizing that these video-cassette recorders are now in such widespread use that whatever economic injury might be caused by them may already have been irreversibly inflicted. It is conceivable that a court will be unwilling to take such a stand.

But despite the result of court proceedings, the judicial resolution of this matter is only a preliminary determination. Since potential economic gains in this area are so large, Congress will ultimately review such decisions and decide, with the aid of the interested parties, whether they should be statutorily overturned. What that Congressional decision will be, and what effect the knowledge that there will be such a Congressional determination will have on court rulings, can only be the subject of the purest speculation.

*Mark E. Kauffelt*

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<sup>123</sup> 17 U.S.C.A. § 504(a) (1976).

<sup>124</sup> 17 U.S.C.A. § 504(c) (1976) provides for a penalty of a "sum not less than \$250 or more than \$10,000 as the court considers just."

<sup>125</sup> See *Universal v. Sony*, No. CV 76 3520 F (C.D. Cal., filed Sept. 17, 1977).